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## Water-dependent uses

### **RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.**

(1) The management of state-owned aquatic lands shall preserve and enhance water-dependent uses. Water-dependent uses shall be favored over other uses in aquatic land planning and in resolving conflicts between competing lease applications. In cases of conflict between water-dependent uses, priority shall be given to uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters, and to state-wide interests as distinguished from local interests.

(2) Nonwater-dependent use of state-owned aquatic lands is a low-priority use providing minimal public benefits and shall not be permitted to expand or be established in new areas except in exceptional circumstances where it is compatible with water-dependent uses occurring in or planned for the area.

### **RCW 79.90.465: Definitions.**

(1) "Water-dependent use" means a use which cannot logically exist in any location but on the water. Examples include, but are not limited to, water-borne commerce; terminal and transfer facilities; ferry terminals; watercraft sales in conjunction with other water-dependent uses; watercraft construction, repair, and maintenance; moorage and launching facilities; aquaculture; log booming; and public fishing piers and parks.

### **Discussion on water-dependent uses**

Water-dependent uses are to be strongly encouraged and fostered on state-owned aquatic lands. These uses include

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## Water-dependent uses

many traditional economic activities that make use of the water, but also other activities such as recreation and aquaculture. Fostering water-dependent uses also includes managing other activities to accommodate them, for example, to prevent nonwater-dependent uses from gradually displacing water-dependent uses.

Water-dependent uses, however, are only one of the many public benefits of state-owned aquatic lands that the department is responsible for providing. In particular, the department must ensure environmental protection, in part by considering and protecting the natural values of any use that is authorized. The department must encourage public access, provide for use of renewable resources, and generate revenue consistent with the other benefits. In addition, the department must meet constitutional requirements to provide for navigation and commerce. There will be many times when the department must restrict even water-dependent uses to provide for these other benefits and uses. SEE ALSO: Public benefits; Environmental protection; Navigation and commerce.

The definition in RCW 79.90.465 is not an exhaustive list of water-dependent uses. The key to deciding what is or is not a water-dependent use is determining whether the use must be on the water itself. If the activity would merely be more convenient to have on the water, but does not need to be there, it is not water-dependent. Also, if the activity should be near the water, but does not need to be on it, it is not water-dependent. Instead, it will be water-oriented or nonwater-dependent.

Many uses that may appear to be water-dependent are actually water-oriented. Water-oriented uses are those which historically have been dependent on a waterfront location, but could now be located elsewhere. For example, loading or unloading raw materials such as fish, wood or petroleum between a boat and a dock is water-dependent, but processing these materials in a waterfront factory is water-oriented. The difference is that the factory could be

moved adjoining uplands (or even to distant uplands). The department makes the determination of what is or is not water-dependent. SEE ALSO: Water-oriented uses; Nonwater-dependent uses.

## WATER-DEPENDENT USES: RENT

### RCW 79.90.480: Determination of annual rent rates for lease of aquatic lands for water-dependent uses--Marina leases.

Except as otherwise provided by this chapter, annual rent rates for the lease of state-owned aquatic lands for water-dependent uses shall be determined as follows:

- (1) (a) The assessed land value, exclusive of improvements, as determined by the county assessor, of the upland tax parcel used in conjunction with the leased area or, if there are no such uplands, of the nearest upland tax parcel used for water-dependent purposes divided by the parcel area equals the upland value.
- (b) The upland value times the area of leased aquatic lands times thirty percent equals the aquatic land value.
- (2) As of July 1, 1989, and each July 1 thereafter, the department shall determine the real capitalization rate to be applied to water-dependent aquatic land leases commencing or being adjusted under subsection (3)(a) of this section in that fiscal year. The real capitalization rate shall be the real rate of return, except that until June 30, 1989, the real capitalization rate shall be five percent and thereafter it shall not change by more than one percentage point in any one year or be more than seven percent or less than three percent.
- (3) The annual rent shall be:
  - (a) Determined initially, and redetermined every four years or as otherwise provided in the lease, by multiplying the aquatic land value times the real capitalization rate; and
  - (b) Adjusted by the inflation rate each year in which the rent is not determined under subsection (3)(a) of this section.
- (4) If the upland parcel used in conjunction with the leased area is not assessed or has an assessed value inconsistent with the purposes of the lease, the nearest comparable upland parcel used

for similar purposes shall be substituted and the lease payment determined in the same manner as provided in this section.

(5) For the purposes of this section, "upland tax parcel" is a tax parcel, some portion of which has upland characteristics. Filled tidelands or shorelands with upland characteristics which abut state-owned aquatic land shall be considered as uplands in determining aquatic land values.

(6) The annual rent for filled state-owned aquatic lands that have the characteristics of uplands shall be determined in accordance with RCW 79.90.500 in those cases in which the state owns the fill and has a right to charge for the fill.

### WAC 332-30-123: Aquatic land use rentals for water-dependent uses.

All requirements in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114). The annual rental for water-dependent use leases of state-owned aquatic land shall be: The per unit assessed value of the upland tax parcel, exclusive of improvements, multiplied by the units of lease area multiplied by thirty percent multiplied by the real rate of return. Expressed as a formula, it is:  $UV \times LA \times .30 \times r = AR$ .

Each of the letter variables in this formula have specific criteria for their use as described below. This step by step presentation covers the typical situations within each section first, followed by alternatives for more unique situations.

(1) Overall considerations.

(a) Criteria for use of formula. The formula:

- (i) Shall be applied to all leases having structural uses that require a physical interface with upland property when a water-dependent use occurs on such uplands (in conjunction with the water-dependent use on the aquatic lands);
- (ii) Shall be used for remote moorage leases by selecting an upland parcel as detailed in subsection (2) of this section;
- (iii) Shall not be used for areas of filled state-owned aquatic lands having upland characteristics where the department can charge rent for such fills (see WAC 332-30-125), renewable and nonrenewable resource uses,

or areas meeting criteria for public use (see WAC 332-30-130); and

(iv) Shall cease being used for leases intended for water-dependent uses when the lease area is not actively developed for such purposes as specified in the lease contract. Rental in such situations shall be determined under the appropriate section of this chapter.

(b) Criteria for applicability to leases. The formula shall be used to calculate rentals for:

(i) All new leases and all pending applications to lease or re-lease as of October 1, 1984;

(ii) All existing leases, where the lease allows calculation of total rent by the appropriate department methods in effect at the time of rental adjustment. Leases in this category previously affected by legislated rental increase limits, shall have the formula applied on the first lease anniversary date after September 30, 1984. Other conditions of these leases not related to rent shall continue until termination or amendment as specified by the lease contract. Leases in this category not previously affected by legislated rental increase limits and scheduled for a rent adjustment after October 1, 1985, shall have the option of retaining the current rent or electing to pay the formula rent under the same conditions as specified in (iii) of this subsection.

(iii) Leases containing specific rent adjustment procedures or schedules shall have the rent determined by the formula when requested by the lessee. Holders of such leases shall be notified prior to their lease anniversary date of both the lease contract rent and formula rent. A selection of the formula rent by the lessee shall require an amendment to the lease which shall include all applicable aquatic land laws and implementing regulations.

(2) Physical criteria of upland tax parcels.

(a) Leases used in conjunction with and supportive of activities on the uplands. The upland tax parcel used shall be waterfront and have some portion with upland characteristics. If no upland tax parcel meets these criteria, then an alternative shall be selected under the criteria of subsection (4) of this section.

(b) Remote moorage leases. The upland tax parcel used shall be waterfront, have some portion with upland characteristics; and

(i) If the remote moorage is associated with a local upland facility, be an appropriate parcel at the facility; or

(ii) If the remote moorage is similar in nature of use to moorages in the area associated with a local upland facility, be an appropriate parcel at the facility; or

(iii) If the remote moorage is not associated with a local upland facility, be the parcel closest in distance to the moorage area.

(c) Priority of selection. If more than one upland tax parcel meets the physical criteria, the priority of selection shall be:

(i) The parcel that is structurally connected to the lease area;

(ii) The parcel that abuts the lease area;

(iii) The parcel closest in distance to the lease area. If more than one upland tax parcel remains after this selection priority, then each upland tax parcel will be used for its portion of the lease area. If there is mutual agreement with the lessee, a single upland tax parcel may be used for the entire lease area. When the unit value of the upland tax parcels are equal, only one upland tax parcel shall be used for the lease area.

(d) The unit value of the upland tax parcel shall be expressed in terms of dollars per square foot or dollars per acre, by dividing the assessed value of the upland tax parcel by the number of square feet or acres in the upland tax parcel. This procedure shall be used in all cases even if the value attributable to the upland tax parcel was assessed using some other unit of value, e.g., front footage, or lot value. Only the "land value" category of the assessment record shall be used; not any assessment record category related to improvements.

(3) Consistent assessment. In addition to the criteria in subsection (2) of this section, the upland tax parcel's assessed value must be consistent with the purposes of the lease and method of rental establishment. On this basis, the following situations will be considered inconsistent and shall either require adjustment as specified, or selection of an alternative upland tax parcel under subsection (4) of this section:

- (a) The upland tax parcel is not assessed. (See chapter 84.36 RCW Exemptions);
  - (b) Official date of assessment is more than four years old. (See RCW 84.41.030);
  - (c) The "assessment" results from a special tax classification not reflecting fair market value. Examples include classifications under: State-regulated utilities (chapter 84.12 RCW), Reforestation lands (chapter 84.28 RCW), Timber and forest lands (chapter 84.33 RCW), and Open space (chapter 84.34 RCW). This inconsistency may be corrected by substituting the full value for the parcel if such value is part of the assessment records;
  - (d) If the assessed valuation of the upland tax parcel to be used is under appeal as a matter of record before any county or state agency, the valuation on the assessor's records shall be used, however, any changes in valuation resulting from such appeal will result in an equitable adjustment of future rental;
  - (e) The majority of the upland tax parcel area is not used for a water-dependent purpose. This inconsistency may be corrected by using the value and area of the portion of the upland tax parcel that is used for water-dependent purposes if this portion can be segregated from the assessment records; and
  - (f) The size of the upland tax parcel in acres or square feet is not known or its small size results in a nominal valuation, e.g., unbuildable lot.
- (4) Selection of the nearest comparable upland tax parcel. When the upland tax parcel does not meet the physical criteria or has an inconsistent assessment that can't be corrected from the assessment records, an alternative upland tax parcel shall be selected which meets the criteria. The nearest upland tax parcel shall be determined by measurement along the shoreline from the inconsistent upland tax parcel.
- (a) The alternative upland tax parcel shall be located by order of selection priority:
    - (i) Within the same city as the lease area, and if not applicable or found;
    - (ii) Within the same county and water body as the lease area, and if not found;

- (iii) Within the same county on similar bodies of water, and if not found;
  - (iv) Within the state.
- (b) Within each locational priority of (a) of this subsection, the priority for a comparable upland tax parcel shall be:
- (i) The same use class within the water-dependent category as the lease area use;
  - (ii) Any water-dependent use within the same upland zoning;
  - (iii) Any water-dependent use; and
  - (iv) Any water-oriented use.
- (5) Aquatic land lease area. The area under lease shall be expressed in square feet or acres.
- (a) Where more than one use class separately exist on a lease area, the formula shall only be applied to the water-dependent use area. Other use areas of the lease shall be treated according to the regulations for the specific use.
  - (b) If a water-dependent and a nonwater-dependent use exist on the same portion of the lease, the rent for such portion shall be negotiated taking into account the proportion of the improvements each use occupies.
- (6) Real rate of return.
- (a) Until July 1, 1989, the real rate of return to be used in the formula shall be five percent.
  - (b) On July 1, 1989, and on each July 1 thereafter the department shall calculate the real rate of return for that fiscal year under the following limitations:
    - (i) It shall not change by more than one percentage point from the rate in effect for the previous fiscal year; and
    - (ii) It shall not be greater than seven percent nor less than three percent.
- (7) Annual inflation adjustment of rent. The department shall use the inflation rate on a fiscal year basis e.g., the inflation rate for calendar year 1984 shall be used during the period July 1, 1985 through June 30, 1986. The rate will be published in a newspaper of record. Adjustment to the annual rent of a lease shall occur on the anniversary date of the lease except when the rent is redetermined under subsection (9) of this section. The inflation adjustment each year is the inflation rate times the previous year's rent except in cases of stairstepping.

(9) The annual rental shall be redetermined by the formula every four years or as provided by the existing lease language. If an existing lease calls for redetermination of rental during an initial stairstepping period, it shall be determined on the scheduled date and applied (with inflation adjustments) at the end of the initial stairstep period.

### **Discussion on water-dependent uses: rent**

Water-dependent uses of state-owned aquatic lands must pay rent to the state based on the water-dependent rent formula. The purpose of this formula is to establish “equitable and predictable lease rates for users of state-owned aquatic lands,” and to foster water-dependent uses by granting rents below fair market value, as provided in RCW 79.90.450 and RCW 79.90.455. This formula applies only to uses that meet the definition of water-dependent. SEE ALSO: Public benefits.

Under the formula, the annual rent per acre of aquatic land equals the value of an acre of a comparable upland parcel, times thirty percent, times the real capitalization rate. Rents are determined every four years and adjusted for inflation in intervening years, unless otherwise provided for in the lease. The real capitalization rate is evaluated and re-set at least every two years to reflect current economic conditions. Currently, it is about 6 percent.

If a parcel of state-owned aquatic lands has been filled and now has the characteristics of uplands, and if the state owns the fill and has the right to charge rent for it, then the rent is instead determined as if the use is nonwater-dependent. This is true no matter the use. SEE ALSO: Fill; Nonwater-dependent uses.

Log storage is a water-oriented use, but log storage rents are based on a special variation of the water-dependent rent formula. In contrast, log booming follows the regular water-dependent rent formula. SEE ALSO: Log storage; Log booming.

The procedures for determining water-dependent rent, included for determining the upland tax parcel, are detailed in WAC 332-30-123, below.

## **WATER-DEPENDENT USES: RENT, ANNUAL ADJUSTMENTS**

### **RCW 79.90.490: Rent for leases in effect October 1, 1984.**

...Thereafter [after October 1, 1984], notwithstanding any other provision of this title, the annual rental established under RCW 79.90.480 or 79.90.485 shall not increase more than fifty percent in any year. This section applies only to leases of state-owned aquatic lands subject to RCW 79.90.480 or 79.90.485.

### **Discussion on water-dependent uses: rent, annual adjustments**

If the annual water-dependent rent adjustment based on the inflation rate and capitalization rate would cause a rent increase of more than 50 percent for a given lessee, the actual rent due from that lessee will increase by only 50 percent. In future years, the rent is to be adjusted as if the full rent increase had been made. Therefore, the department must calculate the fully adjusted rent, even if the lessee is paying less actual rent under this statute.

## **WATER-DEPENDENT USES: RENT INVOLVING NONWATER-DEPENDENT USES**

### **RCW 79.90.505: Aquatic lands--Rents for multiple uses.**

If water-dependent and nonwater-dependent uses occupy separate portions of the same leased parcel of state-owned aquatic land, the rental rate for each use shall be that established for such use by this chapter, prorated in accordance with the proportion of the whole parcel that each use occupies. If water-dependent and

nonwater-dependent uses occupy the same portion of a leased parcel of state-owned aquatic land, the rental rate for such parcel shall be subject to negotiation with the department taking into account the proportion of the improvements each use occupies.

**RCW 79.90.510: Aquatic lands--Lease for water-dependent use-- Rental for nonwater-dependent use.**

If a parcel leased for water-dependent uses is used for an extended period of time, as defined by rule of the department, for a nonwater-dependent use, the rental for the nonwater-dependent use shall be negotiated with the department.

**Discussion water-dependent uses: rent involving nonwater-dependent uses**

If a water-dependent use is conducted together with or in the same space as a nonwater-dependent use, or if a lease for a water-dependent use is instead used for nonwater-dependent activities, the rent must be adjusted to account for the nonwater-dependent use. In these cases, rent for the nonwater-dependent portion is to be negotiated between the department and the tenant.

Nonwater-dependent uses must pay rent based on fair market value and also must meet much stricter standards than water-dependent uses to be allowed at all. The department may choose not to authorize a nonwater-dependent use if it does not meet the requirements for such use. Also, depending on the circumstances, the department may cancel a lease if it is improperly changed to nonwater-dependent use. SEE ALSO: Nonwater-dependent uses.

## Water-oriented uses

**RCW 79.90.465: Definitions.**

The definitions in this section apply throughout chapters 79.90 through 79.96 RCW.

(2) "Water-oriented use" means a use which historically has been dependent on a waterfront location, but with existing technology could be located away from the waterfront. Examples include, but are not limited to, wood products manufacturing, watercraft sales, fish processing, petroleum refining, sand and gravel processing, log storage, and house boats. For the purposes of determining rent under this chapter, water-oriented uses shall be classified as water-dependent uses if the activity either is conducted on state-owned aquatic lands leased on October 1, 1984, or was actually conducted on the state-owned aquatic lands for at least three years before October 1, 1984. If, after October 1, 1984, the activity is changed to a use other than a water-dependent use, the activity shall be classified as a nonwater-dependent use. If continuation of the existing use requires leasing additional state-owned aquatic lands and is permitted under the shoreline management act of 1971, chapter 90.58 RCW, the department may allow reasonable expansion of the water-oriented use.

**Discussion on water-oriented uses**

Water-oriented uses are mid-way between water-dependent and nonwater-dependent uses. The water-oriented classification was established to "grandfather" some uses of aquatic lands and to protect investments in development that traditionally had utilized a waterfront location but no longer need to and are no longer encouraged there.

A water-oriented use will be treated as either a water-dependent use or a nonwater-dependent use, based on the date it was established. Specifically, if the use was conducted on that site on October 1, 1984, or if it was conducted on that site for at least three years total before October 1, 1984, then that use will be treated as if it were water-dependent. SEE ALSO: Water-dependent uses.

A water-oriented use established or changed after October 1, 1984, however, is to be treated as if it were nonwater-dependent. Also, if the original water-oriented use existing on October 1, 1984 is changed to a different

water-oriented use, then the new water-oriented use would be treated as if it were nonwater-dependent. SEE ALSO: Nonwater-dependent uses.

If a water-oriented use existed for three years total before October 1, 1984, but not on October 1, 1984, then the tenant may change the use back to the original water-oriented use and still have it treated as if it were water-dependent. However, this opportunity is limited. If the tenant first changes the use to something else before then changing it back to the original water-oriented use, then that water-oriented use will now be considered newly established and will be treated as if it were nonwater-dependent.

If a water-oriented use is treated as a nonwater-dependent use, it must pay rent as a nonwater-dependent use and also must meet the strict standards for authorizing nonwater-dependent uses in the first place. The statutory definition of water-oriented uses draws a clear distinction between water-oriented and water-dependent uses by saying that water-oriented uses “could be located away from the waterfront.” This suggests that, in this characteristic, water-oriented uses are equivalent to nonwater-dependent uses. This definition also states that water-oriented uses “historically [have] been dependent on a waterfront location.” Accordingly, to account for this historic dependence, the statute provides for treating historically existing water-oriented uses as water-dependent. Therefore, the department will treat water-oriented uses which were **not** historically existing as nonwater-dependent uses for all purposes, including for determining rent and for determining whether the use should be authorized at all.

If a water-oriented use is to be treated as a nonwater-dependent use, the department will approach an application for lease or re-lease of state-owned aquatic lands based on the same strict requirements for nonwater-dependent uses. These include rejection of an application if:

- # There are no qualifying exceptional circumstances;

- # The use is incompatible with existing or planned water-dependent uses;
- # The use will conflict with the other public benefits of aquatic lands, or with any aquatic uses or resources of state-wide value; or
- # The use will cause significant adverse environmental impacts.

The department makes the determination of whether a use proposed for or existing on state-owned aquatic lands is water-oriented and whether it should now be treated as if it were water-dependent or nonwater-dependent. The applicant has the burden of proof to show that the use was established before October 1, 1984.

## Watershed planning

SEE: Aquatic land use planning.

## Waterways

### **RCW 79.93.010: First class tide and shore lands to be platted--Public waterways and streets.**

It shall be the duty of the department of natural resources simultaneously with the establishment of harbor lines and the determination of harbor areas in front of any city or town, or as soon thereafter as practicable, to survey and plat all tide and shore lands of the first class not heretofore platted, and in platting the same to lay out streets which shall thereby be dedicated to public use, subject to the control of the cities or towns in which they are situated. The department shall also establish one or more public waterways not less than fifty nor more than one thousand feet wide, beginning at the outer harbor line and extending inland across the tidelands belonging to the state. These waterways shall include within their boundaries, as nearly as practicable, all navigable streams running through such tidelands, and shall be located at such other places as in the

judgment of the department may be necessary for the present and future convenience of commerce and navigation. All waterways shall be reserved from sale or lease and remain as public highways for watercraft until vacated as provided for in this chapter. The department shall appraise the value of such platted tide and shore lands and enter such appraisals in its records in the office of the commissioner of public lands.

**RCW 79.93.040: Permits to use waterways.**

If the United States government has established pierhead lines within a waterway created under the laws of this state at any distance from the boundaries established by the state, structures may be constructed in that strip of waterway between the waterway boundary and the nearest pierhead line only with the consent of the department of natural resources and upon such plans, terms, and conditions and for such term as determined by the department. However, no permit shall extend for a period longer than thirty years. The department may cancel any permit upon sixty days' notice for a substantial breach by the permittee of any of the permit conditions. If a waterway is within the territorial limits of a port district, the duties assigned by this section to the department may be exercised by the port commission of such port district as provided in RCW 79.90.475. Nothing in this section shall confer upon, create, or recognize in any abutting owner any right or privilege in or to any strip of waterway abutting any street and between prolongations of the lines of such street, but the control of and the right to use such strip is hereby reserved to the state of Washington, except as authorized by RCW 79.90.475.

**RCW 79.93.050: Excavation of waterways--Waterways open to public--Tide gates or locks.**

All waterways excavated through any tide or shore lands belonging to the state of Washington by virtue of the provisions of chapter 99, Laws of 1893, so far as they run through said tide or shore lands, are hereby declared to be public waterways, free to all citizens upon equal terms, and subject to the jurisdiction of the proper authorities, as otherwise provided by law: PROVIDED, That where tide gates or locks are considered by the contracting parties excavating any waterways to be necessary to the efficiency of the same, the department of natural resources may,

in its discretion, authorize such tide gates or locks to be constructed and may authorize the parties constructing the same to operate them and collect a reasonable toll from vessels passing through said tide gates or locks: PROVIDED FURTHER, That the state of Washington or the United States of America can, at any time, appropriate said tide gates or locks upon payment to the parties erecting them of the reasonable value of the same at the date of such appropriation, said reasonable value to be ascertained and determined as in other cases of condemnation of private property for public use.

**RCW 79.93.060: Vacation of waterways--Extension of streets.**

If a waterway established under the laws of this state, or any portion of the waterway, has not been excavated, or is not used for navigation, or is not required in the public interest to exist as a waterway, such waterway or portion thereof may be vacated by written order of the commissioner of public lands upon request by ordinance or resolution of the city council of the city in which such waterway is located or by resolution of the port commission of the port district in which the waterway is located. If the waterway or portion thereof which is vacated is navigable water of the United States, or otherwise within the jurisdiction of the United States, a copy of such resolution or ordinance, together with a copy of the vacation order of the commissioner of public lands shall be submitted to the United States Army Corps of Engineers for their approval, and if they approve, the waterway or portion thereof is vacated: PROVIDED, That if a port district owns property abutting the waterway and the provisions of this section are otherwise satisfied, the waterway, or the portion thereof that abuts the port district property, shall be vacated. Upon such vacation of a waterway, the commissioner of public lands shall notify the city in which the waterway is located, and the city has the right, if otherwise permitted by RCW 79.94.150, to extend across the portions so vacated any existing streets, or to select such portions of the waterway as the city may desire for street purposes, in no case to exceed one hundred fifty feet in width for any one street. Such selection shall be made within sixty days subsequent to the receipt of notice of the vacation of the portion of the waterway. If the city fails to make a selection within such time, or selects only a portion of the waterway, the title of the



remaining portions of the vacated waterway shall vest in the state, unless the waterway is located within the territorial limits of a port district, in which event, if otherwise permitted by RCW 79.94.150, the title shall vest in the port district. The title is subject to any railroad or street railway crossings existing at the time of such vacation.

### **WAC 332-30-106 Definitions.**

(74) "Waterway" means an area platted across aquatic lands or created by a waterway district providing for access between the uplands and open water, or between navigable bodies of water.

### **WAC 332-30-117: Waterways.**

[Note: See below before implementing this WAC.]

(1) Purpose and applicability. This section describes the requirements for authorizing use and occupation of waterways under the department's authority as proprietor of state-owned aquatic lands. This section applies to waterways established in accordance with RCW 79.93.010 and 79.93.020. This section does not apply to uses of Salmon Bay Waterway, or to the East and West Duwamish Waterways in Seattle authorized under RCW 79.93.040.

(2) Priority use. Providing public navigation routes between water and land for conveniences of navigation and commerce is the priority waterway use.

(3) Permit requirement. In order to assure availability of waterways for present and future conveniences of navigation and commerce, moorage (other than transient moorage for fewer than 30 days), and other waterway uses shall require prior authorization from the department. Permits may be issued for terms not exceeding one year if there will be no significant interference with the priority waterway use or short-term moorage. Permits may be issued for terms not exceeding five years for uses listed in subsection (4) of this section in instances in which existing development, land use, ownership, or other factors are such that the current and projected demand for priority waterway uses is reduced or absent.

(4) Permit priority. In cases of competing demands for waterways, the following order of priority will apply:

- (a) Facilities which provide public access to adjacent properties for loading and unloading of watercraft;

- (b) Water-dependent commerce, as defined in WAC 332-30-115(1), related to use of the adjacent properties;
- (c) Other water-dependent uses;
- (d) Facilities for nonnavigational public access;
- (e) Other activities consistent with the requirements in WAC 332-30-131(4) for public use facilities.

(5) Waterway permits. All necessary federal, state, and local permits shall be acquired by those proposing to use waterways. Copies of permits must be furnished to the department prior to authorizing the use of waterways.

(6) Obstructions. Permanent obstruction of waterways, including filling is prohibited. Structures associated with authorized uses in waterways shall be capable of ready removal. Where feasible, anchors and floats shall be preferred over pilings.

(7) Permit process. Applications for waterway permits will be processed as follows:

- (a) Local government review of permit applications will be requested.
- (b) Public comment will be gathered through the shoreline permit process, if applicable. If no shoreline permit is required, public comment will be gathered through the methods described in WAC 332-41-510(3).
- (c) Applications will be reviewed for consistency with the policy contained in this chapter.
- (d) Evaluation will consider existing, planned, and foreseeable needs and demands for higher priority uses in the waterway and in the associated water body.

(8) The department will require waterway permittees to provide security in accordance with WAC 332-30-122(5) to insure the provisions of waterway permits are fulfilled.

(9) Cancellation. Permission to use waterways is subject to cancellation in order to satisfy the needs of higher priority waterway uses. Transient moorage may be required to move at any time. Waterway permits are cancellable upon ninety days' notice when the sites are needed for higher priority uses.

(10) Monitoring. Local governments will be encouraged to monitor waterway use and to report any uses not in compliance with this regulation.

(11) Planning. Planning for waterway use will be encouraged. The shoreline planning process should provide for the long range needs of preferred waterway uses and other state-wide values.

Planning should also consider the availability of other public property, such as platted street ends, to serve anticipated needs.

(12) Existing uses. Existing waterway uses, structures, and obstructions will be reviewed for compliance with this section.

Uses not in compliance shall be removed within one year from the date notification of noncompliance is mailed unless the public interest requires earlier removal. Unless early removal is required, removal may be postponed if the department receives a request for vacation of the waterway from the city or port district in accordance with RCW 79.93.060. If the request for waterway vacation is denied, the structure must be removed within six months of mailing of notice of denial or within one year of the original date of notification of noncompliance, whichever is later.

(13) Fees. Waterway permit fees will be determined on the same basis as required for similar types of uses on other state-owned aquatic lands.

(14) Filled areas. Certain waterways contain unauthorized fill material. The filled areas have generally assumed the characteristics of the abutting upland. Nonwater-dependent uses may be allowed on existing fills when there will be no interference with priority or other permitted waterway uses and when permitted under applicable local, state, and federal regulations.

## Discussion on waterways

Waterways are designated areas over first class tidelands, usually within surrounding harbor areas, which are reserved for public highway purposes. The primary use of waterways is to allow for “the present and future convenience of commerce and navigation” by providing public navigation routes between deep water and the land inside of the inner harbor line.

Long-term authorization for use of a waterway may be granted only within those waterways where the federal government has established pierhead lines within the waterway, namely the Salmon Bay Waterway and the East and West Duwamish Waterways, as described in RCW 79.93.040. A permit is required to use or occupy the area on the edges of the waterway between the waterway

boundaries and the nearest pierhead line. This permit is much like a standard use authorization. Long-term permits may be granted for the same uses and under the same general conditions as on other state-owned aquatic lands, but they will require more intensive review to ensure they do not conflict with navigation or commerce. The authorization may be issued for up to 30 years, but should generally be written not to exceed 12 years. Long-term permits can be canceled upon 60 days notice for substantial breach of use authorization conditions.

Different rules exist for granting permits in waterways other than those listed above, as described in WAC 332-30-117. However, there is no clear statutory authority for issuing these permits. RCW 79.93.010 states that “All waterways shall be reserved from sale or lease and remain as public highways for watercraft until vacated as provided for in this chapter.” RCW 79.93.040 establishes an exception to this, but the exception authorizes permits only where the United States government, through the Army Corps of Engineers, has established pierhead lines. (In fact, the Corps no longer establishes these lines, but the Legislature has never revised the statutes to reflect this.) These statutes create the strong presumption that waterways are to serve only as avenues of transportation, unless other uses are explicitly authorized.

Therefore, the department will not issue future waterway permits under WAC 332-30-117 until the statutory authority is clarified. Existing permits will continue under the terms provided for in WAC 332-30-122. Any person proposing or placing a structure or activity in a waterway should be notified that permits under WAC 332-30-117 will not be granted. If the use or activity is not otherwise appropriately authorized, or if it causes significant damage to state-owned aquatic lands or significant impact on navigation within the waterway, the use or activity will be subject to trespass action. SEE ALSO: Unauthorized uses.